

IN THE COURT OF APPEALS OF IOWA

No. 3-1110 / 13-0484
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY LEE CARTER JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, John D. Telleen (plea hearing) and Mary E. Howes (sentencing), Judges.

A defendant appeals his sentence for willful injury causing bodily injury.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.

Mark C. Smith, State Appellate Defender, and Melinda Nye, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Triick, Assistant Attorney General, Michael J. Walton, County Attorney, and Melisa Zaehring, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

TABOR, J.

During an argument about enforcement of the dress code at a Davenport sports bar, Terry Lee Carter Jr. shoved his beer bottle into the bouncer's face, cutting his lip and chipping his tooth. The State charged Carter with willful injury causing serious injury, a class "C" felony. Following negotiations with the prosecutor, Carter entered a guilty plea to willful injury causing bodily injury, a class "D" felony, and received a prison sentence not to exceed five years. Carter challenges his sentence on appeal, claiming the district court considered the greater, unprosecuted charge.

When giving its rationale for denying probation, the sentencing court repeatedly said Carter "seriously injured" his victim. We find those statements manifest the court's consideration of an impermissible factor and remand for resentencing.

I. Background Facts and Proceedings

February 9, 2012, was dollar bottle night at Rookies Bar and Grill in Davenport. Carter and his friends entered the bar and bought several bottles of beer before they were confronted by security guards ordering them to leave because they were in violation of the dress code. Joe Biszewski, who was working the back door, got into a heated argument with Carter. Biszewski recalled Carter wearing a long shirt, baggie pants, and a chain around his neck. Carter swung a beer bottle, striking Biszewski in the face. Biszewski sustained a lacerated lip requiring stitches and leaving a scar. The blow also chipped his tooth.

On March 7, 2012, the State filed a trial information charging Carter with willful injury causing serious injury, in violation of Iowa Code section 708.4(1) (2011), a class “C” felony. The State reached a plea agreement with Carter, reducing the charge to willful injury causing a bodily injury, a violation of section 708.4(2), a class “D” felony. The plea agreement allowed the State to make any sentencing recommendation, and Carter was required to make restitution to be determined by Rookies’ workers’ compensation carrier.

Carter entered his guilty plea at a hearing on February 8, 2013. Carter acknowledged that by hitting the victim in the face with the beer bottle, he intended to cause serious injury and caused bodily injury.

The court scheduled Carter’s sentencing hearing for March 21, 2013. The twenty-four-year-old admitted to the presentence investigator that his heavy consumption of alcohol had caused problems in his life. Carter said he stopped hanging out with “partiers” and was spending more time with his children. At the sentencing hearing, Carter’s attorney argued for probation, asserting his client’s “mindset [had] changed” and he was “determined to make the changes necessary for him to go forward.” The State recommended an indeterminate five-year prison term to run consecutively with another willful injury conviction Carter had pending on appeal. In his allocution, Carter told the court he had “changed a lot.”

The court responded as follows:

Well, Mr. Carter, the problem is . . . you’re a violent person, and that’s what your history shows and in this offense, you seriously injured someone who was just trying to do their job. The person trying to do their job, and then, you haul off and seriously

injure them, punch them, hit them with a beer bottle, and you're picking up a serious assault, like every year, because you had already the offense, I think it was, the year before where you pled guilty to Willful Injury Causing Bodily Injury. . . . So here's a person that has been called upon their behavior. They have been arrested. They have pled guilty, and then they go out and seriously injure a perfectly innocent person who is trying to do their job. That's not a person that deserves probation in my mind.

The court imposed an indeterminate five-year prison term, suspended the \$750 fine, and ordered court costs, surcharge, and restitution. Carter appeals his sentence.

II. Standard of Review

We generally review sentencing decisions for an abuse of discretion. *State v. Knight*, 701 N.W.2d 83, 85–86 (Iowa 2005). One way a sentencing court can abuse its discretion is by considering an impermissible factor. *Id.* If we determine the sentencing court considered an impermissible factor, “we cannot speculate about the weight the court mentally assigned this factor, or whether it tipped the scales to imprisonment.” *State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981). In those cases, we simply order resentencing. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

III. Merits

When choosing the appropriate sentence, a district court may not rely upon additional, unproven, or unprosecuted charges unless the defendant admits those charges or facts are presented to show the defendant committed those other offenses. *State v. Washington*, 832 N.W.2d 650, 659 (Iowa 2013). Where the sentencing court improperly considered an unprosecuted or unproven charge, we will remand the matter for resentencing. *Id.*

In this case, the sentencing court stated three times that Carter “seriously injured” the victim, despite the fact that serious injury was not an element of section 708.4(2). The State argues it would be reasonable to conclude the judge “meant serious injury in the colloquial rather than the legal sense.” We reject that argument. “Serious injury” is a term of art in Iowa criminal law. It is defined as either “disabling mental illness” or “bodily injury which does any of the following: (1) Creates a substantial risk of death; (2) Causes serious permanent disfigurement; [or] (3) Causes protracted loss or impairment of the function of any bodily member or organ.” Iowa Code § 702.18. We cannot assume the sentencing judge suddenly shed her legal training and was speaking as a lay person when characterizing the victim’s injuries.

The State originally charged Carter with the class “C” felony version of willful injury but did not prosecute or prove the causing-serious-injury element. Instead, the State made a charging concession, and Carter only admitted inflicting a bodily injury.

This case is similar to *State v. Thompson*, 275 N.W.2d 370 (Iowa 1979). There, the State originally charged the defendant with second-degree burglary, but in accordance with a plea bargain the charge was reduced to third-degree theft. *Thompson*, 275 N.W.2d at 371. In imposing a sentence of imprisonment, the district court considered the fact a higher crime originally had been charged.

Id. Remanding the case for resentencing, our supreme court stated:

A sentencing court *may not* . . . impose a severe sentence for a lower crime on the ground that the accused actually committed a higher crime *unless* the facts before the court show the accused committed the higher crime or the defendant admits it—even if the

prosecutor originally charged the higher crime and reduced the charge [T]he accused does not admit the higher charge by pleading guilty to the lower charge.

Id. at 372.

The State urges us to find the facts, as set forth in the minutes of evidence, were sufficient for the sentencing court to find Carter committed the greater offense. While the minutes noted the bouncer was left with a scar on his lip, not all scarring amounts to serious permanent disfigurement. See *State v. Hanes*, 790 N.W.2d 545, 554 (Iowa 2010) (finding it proper to allow the jury to determine whether a scar constitutes serious permanent disfigurement). We recognize “[t]here is no general prohibition against considering other criminal activities by a defendant as factors that bear on the sentence to be imposed.” See *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000) (allowing judge to consider defendant’s criminal activity presented to him in sworn testimony at sentencing hearing). But here, Carter did not admit causing serious injury to Biszewski, and the sentencing court did not make any finding that facts existed to substantiate the higher charge. See *Messer*, 306 N.W.2d at 733.

We conclude the district court impermissibly considered the unproven offense of willful injury causing serious injury. For that reason, we vacate the sentence and remand for resentencing.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.